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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

OFFICE OF THE COCHISE COUNTY ATTORNEY, by and through Cochise County Attorney BRIAN M. McINTYRE a political subdivision of the State of Arizona, Appellant, vs. DAVID MORGAN, an unmarried individual, Appellee.	**Case No. 2 CA-CV 2018-0093**

APPELLANT'S REPLY BRIEF

THE OFFICE OF THE COCHISE COUNTY ATTORNEY
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SUMMARY OF REBUTTAL TO AMENDED ANSWERING BRIEF

This case is not, as Mr. Morgan attempts to re-cast it, an effort to prevent publication of a news story detailing what Mr. Morgan saw during public proceedings conducted before a criminal trial court. The County's request was never to alter Mr. Morgan's writings about a motion for remand. Instead, the County was at all times concerned with Mr. Morgan's admitted acts of publicizing an unredacted transcript containing all grand jurors' full names, a recitation of the secret proceedings, and exhibits presented therein, including a depiction of the deceased victim.[1] The record demonstrates that Mr. Morgan knew his acts of publicizing the Protected Materials was illegal as well as violative of civil statutes and a standing Court Order, but persisted and expanded upon his publication of the Protected Materials, including the "shocking photo" of the victim, despite that his article was, in his own words, ***not*** "really … about the grand jury transcript." [IR 29, February 20, 2018 Trans. at p. 27, l. 16 - p. 31, l. 12 & p. 35, l. 2-7.]

Indeed, Mr. Morgan's assertions that the County's efforts to enforce the protections of grand jury secrecy and victim privacy statutes amount to a prior restraint in violation of the First Amendment ignore Arizona Supreme Court

[1] As it did in its Opening Brief, the County refers to these materials collectively as the "Protected Materials." References to defined, capitalized terms are the same as identified in the County's Opening Brief.

precedent, which notes that "the First Amendment generally grants the press no right to information about a trial superior to that of the general public." *KPNX Broadcasting v. Superior Court*, 139 Ariz. 246, 255, 678 P.2d 431, 438 (1984). This tenet of Arizona law highlights the fundamental issue in dispute, and emphasizes why the trial court, in ignoring case law cited to it addressing the distinction between public trial proceedings and secret grand jury proceedings, committed an abuse of discretion when it denied the County's Application.

There is material difference between the publication of information gleaned during public proceedings and the issue that was actually before the trial court—enforcing the protections of several statutes that restrict the knowing, unauthorized publication of a victim's image and transcripts of secret proceedings before the grand jury; a collection of laypersons called upon to issue indictments of peers who, in many instances, have perpetrated violent and heinous crimes in the community in which each grand juror lives. The safety, security and privacy concerns for grand jurors, as well as for witnesses who appear before the grand jury, and the individual who is the subject of the Indictment that may issue, support secrecy of the proceedings, which has been honored since before the founding of this nation. *State ex rel. Ronan v. Superior Court*, 95 Ariz. 319, 324, 390 P.2d 109, 113 (1964) ("Complete secrecy has always surrounded the proceedings of the grand jury.");

Carlson v. United States, 837 F.3d 753, 761 (7th Cir. 2016) ("The institution of the grand jury reaches as far back as the twelfth century….").

The policy concerns supporting grand jury secrecy have not changed despite modern advances such as preparation of transcripts of a portion of the proceedings. Indeed, the Arizona Supreme Court observed that "[t]he modern rule authorizing transcripts is not conceived of as a breach of the rule of secrecy, nor is it supposed that the transcripts will be used by, or the contents revealed to, anyone not authorized to learn what had gone on in the grand jury room under the rule of secrecy in its strictest historical interpretation." *State ex rel. Ronan*, 95 Ariz. at 324-25, 390 P.2d at 113. Courts faced with improper disclosure of transcripts of grand jury proceedings have determined that injunctions requiring the return of those documents is the proper avenue of relief, even where there is no way to confirm return of all information that may have leaked into the public domain. *See, e.g.*, *United States v. Nix*, 21 F.3d 347, 352 (9th Cir. 1994); *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1187-88 (9th Cir. 1981). Thus, after Mr. Morgan rebuffed the County's requests for voluntary compliance with the laws, the County sought injunctive relief and presented a narrowly drawn proposed form order requiring Mr. Morgan's removal and return of the Protected Materials.

Mr. Morgan admitted that he repeatedly, knowingly violated the plain terms of each of the statutes, but nonetheless maintained that the statutes did not apply to

him or, alternatively, that the "First Amendment" protected his physical act of publication of a transcript that he did not write and a photograph that he did not take. The trial court, after injecting hypothetical scenarios into the final day of the proceedings, rejected the County's Application on vagueness or overbreadth grounds—defenses that Mr. Morgan had never asserted. The trial court's various abuses of discretion were detailed by the County in its Opening Brief. Mr. Morgan's Amended Answering Brief, which misstates the record and presents a significant amount of information that was not in the record before the trial court, does not rebut a single point made by the County.

The Court of Appeals should reverse the trial court and direct it to enter the form of injunctive relief sought by Cochise County. At a minimum, the Court of Appeals should reverse and remand the matter to the trial court with direction that it make factual findings on all matters before it and enter an injunction consistent with the record and the law applicable to these circumstances.

ARGUMENT

I. MR. MORGAN'S MISSTATEMENTS OF THE RECORD, AND HIS PRESENTATION OF MATTERS THAT WERE NOT ARGUED OR ADMITTED BEFORE THE TRIAL COURT SHOULD BE DISREGARDED.

1. Matters Not In The Trial Court Record Must Be Disregarded.

Mr. Morgan's Amended Answering Brief begins with an alleged quote from an entirely separate proceeding. [Amended Answering Brief at p. 1, citing an alleged quote from oral argument in *State v. Chesmore*, CR201700402]. This statement was not placed in evidence or otherwise presented to the trial court during the evidentiary hearing on the County's Application. The Amended Answering Brief additionally contains approximately twelve pages of commentary and claims pertaining to allegedly corrupt, suspicious or improper conduct of various Cochise County officials dating back approximately 100 years. [*See generally*, Amended Answering Brief, "History of the County and Independent News Publishing" at pp. 8-19.] These matters also were not raised during the proceedings below. The Court of Appeals must not consider any of Mr. Morgan's assertions regarding matters that were not raised or put in the record before the trial court. *See Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993) (court will not consider matters not in the record before it.).

2. The Court Should Disregard Mr. Morgan's Statements That Are Not Supported By Citations To the Record, Particularly As Several Claims Misstate The Record Before The Trial Court.

Even as to matters that were presented to the trial court via testimony, Mr. Morgan's Amended Answering Brief fails to direct this Court to the appropriate portion of the record. Arguments that are unsupported by citations to the record are waived. *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984) ("We are not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate an appellant's claims."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (finding waiver based on failure to comply with appellate procedural rules).

Review of the record reveals why Mr. Morgan failed to direct the Court to the applicable portion of the proceedings—he is frequently misstating the record. For example, Mr. Morgan asserts (Amended Answering Brief at p. 4) that he obtained a full copy of a separate grand jury proceeding—the "Chesmore" case—directly from the Clerk of the Cochise County Superior Court. He does not cite this Court to any support for this assertion, because the record does not support his claim. In fact, during the proceedings, Mr. Morgan testified that he was ***not*** able to obtain copies of the grand jury proceedings from the Clerk of the Court, which is why he approached a defense attorney and requested copies of the Protected

Materials under the auspices of helping the attorney get the information to his client. [IR 29, February 20, 2018 Trans. at p. 69:1-11].

Similarly, Mr. Morgan's assertions (Answering Brief at pp. 5-7) that the County's Opening Brief contains misrepresentations is refuted by examination of the record itself. Although he now apparently believes it is in his interest to deny it, Mr. Morgan did, testify that he was "quite friendly" with homicide defendant Roger Wilson and finds him to be "quite courageous." [IR 29, February 20, 2018 Trans. at p. 20:15-21:5]. Indeed, when questioning Mr. Wilkison, Mr. Morgan suggested that he may have said something to Mr. Wilkison like "I'm Mr. Wilson's friend." [IR 29, March 2, 2018 Trans. at p. 50:7-17]. Moreover, when he took the stand on March 2, he admitted that he "may well have said 'Roger Wilson is my friend.'" [IR 29, March 2, 2018 Trans. at p.169:1-3.] He did not, as he now claims to the Court (Amended Answering Brief at pp. 5-7), deny or rebut that he told Mr. Wilkison when he sought the Protected Materials, that he was a "friend" of homicide defendant Roger Wilson in the course of securing the Protected Materials from Mr. Wilkison. That he now wishes to deny that comment to this Court despite a clear record to the contrary demonstrates his willingness to make inaccurate statements when he believes it suits his needs.

Mr. Morgan's complaint that the County inaccurately represents that he e-mailed the Protected Materials to third parties rather than deliver the information

to defendant Roger Wilson also ignores Mr. Morgan's own testimony that, upon receipt of the full, unredacted copy of the grand jury transcript via e-mail, he forwarded it to several associates. [IR 29, February 20, 2018 Trans. pp. 24:9-25:11]. Finally, and as further discussed in Section II, *infra*, Mr. Morgan's claims that the trial court did not find that public policy considerations, irreparable harm and the balance of harms favored the County are also refuted by the actual record.

II. MR. MORGAN HAS NOT ESTABLISHED ANY BASIS TO ALTER THE TRIAL COURT'S FINDINGS THAT PUBLIC POLICY FAVORED ENTRY OF RELIEF, THAT THE COUNTY HAS SUFFERED IRREPARABLE HARM, AND THAT THE BALANCE OF HARDSHIPS FAVORED RELIEF.

As noted in the County's Opening Brief, the trial court properly determined that the evidence presented to it, and the applicable law, established that the County satisfied its burden to show that it suffered irreparable harm, and further that public policy and the balance of hardships favored entry of the injunctive relief sought by its Application. [Opening Brief at pp. 19-20 & 50-52].

By his original Answering Brief, Mr. Morgan did not raise any dispute with respect to the trial court's findings that the County established irreparable harm, that the balance of hardships favored Cochise County's requested injunction, and that public policy favored entry of the requested relief. Rather, he acknowledged "it may be true about the specified harms to the county government." [Original Answering

Brief at p. 2]. That opinion apparently changed in the few weeks this Court granted him to correct the technical defects in his original filing.

1. The Court Should Disregard Mr. Morgan's Newly-Raised Assertion Of An Alleged Vendetta Against Him, Which The Trial Court Previously Rejected.

By his Amended Answering Brief, Mr. Morgan asserts that the trial court did not find that the County suffered harms or that public policy favored entry of relief. [Amended Answering Brief at p. 8]. In support of these claims, Mr. Morgan references his unsupported and previously unadmitted history of the alleged corruption of officials within Cochise County during the last century. [Amended Answering Brief at pp. 8-19]. The assertions of years of corruption across Cochise County are apparently intended to malign the current Cochise County Attorney Brian McIntyre, and to demonstrate that the County has filed this matter as a "retaliatory effort" against Mr. Morgan. [Amended Answering Brief at p. 19]. Aside from the fact of being born in Douglas, Arizona, which Mr. Morgan casts as an epi-center of corruption within the County, however, Mr. Morgan does not tie County Attorney McIntyre to any corruption.

In making these new, unsupported evidentiary claims,[2] Mr. Morgan ignores that the trial court heard testimony during the preliminary hearing regarding Mr. Morgan's assertions of retaliation or a local vendetta against him and affirmatively rejected Mr. Morgan's arguments. Instead, the trial court held that the County's filing of this matter was not motivated by malice or vendetta. [IR 29, March 2, 2018 Trans. at p. 220, l. 9-11 & 217, l 22- 218, l. 3 (rejecting the assertions that Cochise County instituted the proceedings based upon some "vendetta" against Mr. Morgan.)] The trial court's finding is based upon and supported by the record, which considered Mr. Morgan's testimony regarding the alleged vendetta against him.

Ironically, Mr. Morgan's effort to establish an improper motive on the part of the Cochise County Attorneys' Office by reference to his version of historical events supports the point made by the County since the outset of these proceedings—this has never been about curtailing Mr. Morgan's ability to level various accusations at government bodies or officials, nor does it desire to interfere with Mr. Morgan's ability to question what he believes to be alleged "abuses of local government power." [Answering Brief at p. 19]. Indeed, as his several pages

[2] As detailed in Section I, these unsupported assertions should be wholly disregarded by the Court.

of assertions demonstrate, he has been blogging about his perceived issues within local Cochise County government for "13 years," and certain of these issues have, in fact, received the attention of numerous news agencies aside from his own website. [*See, e.g.*, Answering Brief at p. 13, referencing an article in Phoenix New Times.]

This is not about preventing Mr. Morgan from writing on his website. Instead, in the case, Mr. Morgan violated several statutes. He has done so knowingly, intentionally, and repeatedly, and arresting him was not going to achieve the protections to the public that are intended by the statutes. [IR 29, March 2, 2018 Trans. p. 117:3-23]. Mr. Morgan left the County with no choice but to institute these proceedings and seek the narrow injunctive relief presented to the trial court.

2. Mr. Morgan Ignores The Harms Detailed In The Record, Which Continue And Have Escalated Since The Trial Court's Ruling.

Mr. Morgan's arguments that the County failed to establish harm ignores the record. At the hearing, the County detailed its unsuccessful efforts to curtail Mr. Morgan's misconduct, which he repeated each time he was directed to cease, and which led others to follow Mr. Morgan's unfortunate example. The County Attorney further detailed the potential for jury taint in this sparsely populated

County, as well as specific fears of at least one witness who knew of Mr. Morgan's desire to obtain and publicize grand jury transcripts. [Opening Brief at pp. 19-20].

In short, the public policy concerns attendant to grand jury secrecy and victim image protections were borne out by Mr. Morgan's misconduct. And, rather than guard against infringement of the First Amendment, the trial court's ruling rewarded Mr. Morgan's repeated and broadening disregard of the law, including his decision, after he was repeatedly advised of the illegality and impropriety of his conduct, to provide the Protected Materials "to thousands or tens of thousands of persons—many whose identities are unknown[.]" [Amended Answering Brief at p. 24; *see also* IR 18, pg. 2, ¶ 1; *see also* IR 29, February 20, 2018 Trans. at p. 36, l. 5 - p. 44, l. 24.]

The harms to the State resulting from Mr. Morgan's conduct continue to this date. In addition to his continued publication of the Protected Materials via a hyperlink on his website, the trial court's ruling had the predictable effect of emboldening Mr. Morgan, resulting in further interference with the effective administration of justice in Cochise County. For example, after the trial court's order denying the County's Application, defense counsel for Roger Wilson moved to bar contact between his client and Mr. Morgan due to his inability to mount an adequate defense while communications between Mr. Morgan and Roger Wilson continued. The presiding judge thus issued a "no contact" order between Mr.

Morgan and homicide defendant Roger Wilson. [*See* September 27, 2018, Order.] Unfortunately, the victim in a recent child rape case was not so lucky in avoiding taint in her proceedings. After the State secured a guilty verdict, a new trial was ordered after Mr. Morgan repeatedly publicized images of jurors in violation of a court order, which will lamentably require the State to put a young child on the stand yet again to testify regarding the torment she suffered.[*See* August 22, 2018 Decision and Order in Case No. CR201600734].[3]

As noted in Section I, this Court must disregard Mr. Morgan's newly raised assertions of corruption within the County that were not presented to the trial court. Thus, there is no basis to disturb the trial court's finding that the County did not seek an injunction due to malice against Mr. Morgan. Likewise, there is no basis to revisit or alter the trial court's findings that the County satisfied the elements of

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[3] This Court may properly take judicial notice of these superior court records. *See Samaritan Found. v. Superior Court In & For Cty. of Maricopa*, 173 Ariz. 426, 446, 844 P.2d 593, 613 (Ct. App. 1992), *aff'd in part, vacated in part sub nom. Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 862 P.2d 870 (1993) ("The court of appeals may take judicial notice of state court files."). Unlike the unadmitted information provided in the Amended Answering Brief, *see* Sections I & II, *supra*, Mr. Morgan's conduct in the matters discussed herein post-dated the preliminary hearing, so the State was not able to raise these matters with the trial court. The County also did not raise these matters in its Opening Brief as, at that time, there was no indication that Mr. Morgan would be challenging the trial court's findings with respect to the County's satisfaction of the remaining preliminary injunction elements.

irreparable harm, balance of hardships and public policy considerations in its Application.

III. THE COUNTY HAS ESTABLISHED ITS RIGHT TO RELIEF ON ALL OF THE ISSUES IDENTIFIED IN ITS OPENING BRIEF.

The County's Opening Brief detailed eight issues on appeal. By its Opening Brief, the County established that it is entitled to relief on each of those issues because the trial court abused its discretion by failing to make findings on material elements, by committing an error in the law, by erroneously applying the facts to the law, or by ignoring or misstating facts in the record. Mr. Morgan's Amended Answering Brief does not cite to any facts in the record or applicable authority to rebut the County's demonstrated entitlement to relief.

1. The Trial Court Committed a Clear Abuse of Discretion By Failing To Make Findings as to All Material Elements of the County's Application.

By his Amended Answering Brief, Mr. Morgan does not dispute that he did not seek permission of the Court before he publicized the image of the deceased victim on a hospital bed to the thousands of the individuals on his list serve. He also does not dispute that he knowingly and repeatedly publicized the unredacted names of the members of the grand jury. He also does not dispute that he has

disregarded multiple efforts by Cochise County to ensure that he ceases his illegal activities.

Mr. Morgan's failure to address or rebut these arguments—all of which were detailed in the County's Opening Brief - effectively concedes them. This Court should thus find that the trial court abused its discretion by failing to make any findings or rulings pertaining to Mr. Morgan's violations of A.R.S. § 21-312 and A.R.S. § 39-121.04. Further, the Court should direct the trial court to make factual findings as to all elements of A.R.S. § 13-2812, such as the effect of his possession and knowing publication of the grand jury transcript, irrespective of how he obtained it.

Additionally, Mr. Morgan's admitted conduct violates the plain terms of each statute, this Court should direct the trial court to enter a finding that the County has established a strong likelihood of success on the merits as to all statutes. Finally, as the trial court determined that the County satisfied its burdens as to the remaining requirements for entry of injunctive relief, the trial court should further be directed to enter injunctive relief as to Mr. Morgan's violations of each statute.

2. The Trial Court Committed a Clear Abuse of Discretion by Interjecting Defenses on Behalf of Mr. Morgan Then Relying Upon The Previously Unasserted Defenses to Deny the Application.

By its Opening Brief, the County detailed how the trial court abused its discretion when it asserted defenses of vagueness and overbreadth on behalf of Mr. Morgan. [Opening Brief at pp. 20-21 & 39-43]. Mr. Morgan does not dispute that the trial judge, rather than Mr. Morgan, raised these defenses. The parties thus do not dispute that the trial judge injected new theories on behalf of Mr. Morgan on the last day of the evidentiary hearing. The prejudice to the County in having its neutral arbiter insert new theories on behalf of the defendant and then refuse to allow the County any opportunity for rebuttal is readily apparent. Such conduct constitutes an abuse of the trial court's discretion. *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 307 P.3d 56 (App. 2013).

3. The Trial Court Misstated Facts Regarding the County's Interpretation of A.R.S. § 13-2812, Then Wrongfully Relied Upon Those Facts to Deny the Application.

By its Opening Brief, the County detailed how the trial judge ignored the testimony of the County in response to his hypothetical questions, related to the application of A.R.S. § 13-2812 in a variety of posited scenarios that were not actually at issue. Rather than the allegedly overbroad reading the trial court determined the County must employ, the record reveals that, when questioned, the County Attorney and counsel for the County observed repeatedly that each matter would have to be evaluated on a case by case basis and mere possession of grand

jury materials would not suffice to establish a violation of the secrecy statute. [Opening Brief at pp. 39-40].

By his Amended Answering Brief, Mr. Morgan does not contest the assertions in the County's Opening Brief related to the hypotheticals posed by the trial court, nor does he assert or cite to any portion of the record indicating that the County represented it would enforce the secrecy statute in the broad manner the trial court claimed it would. The parties thus do not dispute that the trial judge disregarded facts that were material to his determination in the case, and misstated facts in arriving at his conclusion with respect to how the County allegedly enforced the grand jury secrecy statute. Such conduct constitutes an abuse of the trial court's discretion. *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 492 ¶ 8, 307 P.3d 56, 59 (App. 2013).

4. The Trial Court Erroneously Applied, and Thus Made Mistakes of Law in Determining That The County Had Not Established a Strong Likelihood of Success on the Merits with Respect to Mr. Morgan's Knowing Publication of the Protected Materials.

Mr. Morgan's claim [Amended Answering Brief at p. 5] that the County devotes a "significant" portion of its Opening Brief on the misrepresentations he made to secure the Protected Materials is not accurate. Certainly, evidence of his misrepresentations to secure the documents supports an inference of intent with respect to the subsequent knowing publication of the information. However, since

Mr. Morgan admitted during the proceedings that he knew the materials were protected, knew that they were subject to court orders sealing them, and nonetheless repeatedly publicized the materials thereafter is additional, direct evidence of his intent in repeatedly violating the statutes. Thus, the County's Opening Brief actually spends less than four pages[4] of its 56-page Opening Brief on Mr. Morgan's misrepresentations to Mr. Wilkison. Rather, the County's Opening Brief was principally concerned with Mr. Morgan's admissions that he knew of the protections accorded to the Protected Materials, and knowingly published them anyway. [Opening Brief at pp. 28-29 & 44-46]. Specifically, the County emphasized the following admissions by Mr. Morgan:

> …there never has been any question, I've never tried to avoid explaining that I published these materials. I was aware that it would cause some consternation. I was aware that County Attorney McIntyre's position was that, and subsequently other people's position was that this was, um, prohibited or -- I guess prohibited is right. One statute is a criminal statute. The other two statutes that are cited aren't criminal statutes, but clearly try to restrict access to these materials, and I understood all of that and I published it because the story is so important.

[IR 29, February 20, 2018 Trans. at p. 63, l. 7-17].

Despite that Mr. Morgan admitted to knowingly publicizing the Protected Materials, the trial court, like Mr. Morgan, focused upon the means by which Mr.

[4] *See* Opening Brief pp. 8 & 10-12.

Morgan obtained the Protected Materials rather than what Mr. Morgan actually did with the Protected Materials when he obtained them. This is an error of law, as the statute criminalizes knowing publication of the Protected Materials, not mere possession. Mr. Morgan does not dispute his knowing, repeated publication of the Protected Materials, and thus admittedly violated the plain terms of A.R.S. § 13-2812.

5. Mr. Morgan Did Not Have Standing to Assert Any Constitutional Defenses Related To the Statutes He Violated.

Mr. Morgan admits by his Amended Answering Brief that grand jury proceedings are "secret proceedings[.]" [Amended Answering Brief at p. 23]. He knew when he obtained the Protected Materials that he had no right to access them, and he knew that publicizing the materials would cause "consternation" before he did it. [IR 29 February 20, 2018 Trans. at p. 17:5-22]. Mr. Morgan knew what he was doing was wrong, and did it anyway. Although he claims that he needed to publicize the Protected Materials because the story was "so important," he admitted during the preliminary hearing that his article was not really about the Protected Materials. [IR 29, February 20, 2018 Trans. at p. 27, l. 16 - p. 31, l. 12 & p. 35, l. 2-7]. This is something the parties agree upon. The Protected Materials were not integral to Mr. Morgan's story. Indeed, he admittedly publicized the photograph for the shock value.

In addition to the statements made by Mr. Morgan in his Amended Answering Brief, the Opening Brief (at pp. 29 & 34-36 & 41) established that Mr. Morgan, in violating the plain terms of each statute at issue, had no standing to challenge the statutes on First Amendment grounds. Aside from generally re-asserting his "prior restraint" and "First Amendment" arguments, Mr. Morgan's Amended Answering Brief does not challenge the County's arguments that the record establishes his violation of the plain terms of the underlying statutes. There is thus no legitimate dispute as to Mr. Morgan's lack of standing. *State v. Kessler*, 199 Ariz. 83, 87 ¶ 17, 13 P.3d 1200, 1204 (App. 2000) ("[O]ne who asserts a claim of statutory overbreadth or vagueness does not have standing if his conduct falls squarely within the constitutionally legitimate prohibitions of the regulation at issue.").

6. Presuming Standing, Mr. Morgan Failed To Satisfy His "Heavy Burden" to Establish That The Statutes are Unconstitutionally Vague or Overbroad.

Assuming, for arguments sake, that Mr. Morgan could raise a First Amendment defense on behalf of third parties, the Opening Brief (at pp. 29-30 & 41-43) detailed the requirement that where a party asserts an overbreadth or vagueness defense as to third parties, "[e]vidence establishing nothing more than 'summary, hypothetical assertions' of alleged harms to third parties will not suffice to defeat a statute on overbreadth grounds, particularly where 'misuse of the statute,

if such occurs, can be cured through case-by-case analysis of specific facts.' *Brown*, 207 Ariz. at 238 ¶ 21, 85 P.3d at 116." [Opening Brief at p. 42].

In his Amended Answering Brief (at p. 24), Mr. Morgan makes the unsupported assertion that the County was attempting to make Mr. Morgan, and "perhaps others" fearful of publishing news and documents. Mr. Morgan's speculation that others may be fearful is insufficient to demonstrate the actual harms that he was to present to satisfy his "heavy burden" to challenge the constitutionality of the statute on behalf of third parties.

It is no surprise that Mr. Morgan could not point to any evidence of actual harms, or any "chilling effect" to third parties. The record at the trial court is devoid of specific assertions as to a chilling effect of the statute upon Mr. Morgan or any third party. To the contrary, as acknowledged by the trial court, Mr. Morgan's conduct incited others—namely, Tim Stellar of the Arizona Daily Sun—to engage in precisely the same wrongful conduct. [IR 29, March 2, 2018 Trans. at pp. 178:1-179:19]. Thus, the evidence only shows additional harm to the County in its ability to enforce protect its citizens by enforcing known violations of the law. There is absolutely no showing in the record or by Mr. Morgan in his Amended Answering Brief or otherwise of a harms upon third parties. This is fatal to his defense. *State v. Kessler*, 199 Ariz. 83, 87 ¶ 18, 13 P.3d 1200, 1204 (App. 2000) (to assert third party harms, the individual must demonstrate a "real and substantial" imposition

upon the First Amendment rights of others, and further show that the challenged statute is not "readily subject to a narrowing construction.").

7. The Trial Court Abused Its Discretion By Failing To Evaluate Whether a Narrowed Construction of A.R.S. § 13-2812 Could Salvage The Statute's Constitutionality.

As noted in its Opening Brief (at p. 46), before declaring the statute unconstitutional, the trial court must evaluate (among other things) whether a limiting construction could avoid or resolve constitutional issues. *State v. Steiger*, 162 Ariz. 138, 145, 781 P.2d 616, 623 (Ct. App. 1989) ("Finally, before we declare A.R.S. § 13–1804(A)(8) unconstitutional, we must consider whether a limiting construction could be placed on the statute to cure the constitutional infirmity."). In denying the County's Application, the trial court did not evaluate whether a more narrow construction could accomplish the purposes of the statute, which the trial court acknowledged to guard "a long-established, recognizable, legitimate, and protectible interest, as was very well articulated by Mr. McIntyre, in maintaining grand jury secrecy." [IR 29, March 2 Trans at p. 214:3-5].

As with other substantive matters presented in the Opening Brief, Mr. Morgan does not contest that the trial court failed to undertake any evaluation as to the potential for a limiting construction. There is thus no dispute amongst the parties that the trial court failed to undertake the required limiting construction

analysis. The trial court thus abused his discretion by failing to properly apply the law to the facts in evidence.

8. The Trial Court Abused Its Discretion by Disregarding Authority Cited by the County on Grand Jury Proceedings; Instead Relying upon Distinguishable Authorities.

As noted in the County's Opening Brief (pp. 36-39 & 46-50), despite the County's citation to cases addressing grand jury materials, including treatment of such materials in circumstances substantially similar to this matter, the trial court's ruling made no reference to those authorities. Instead, the trial court relied upon cases evaluating public statements or public proceedings, and ignored the case law presented by the County detailing matters involving efforts to protect the secrecy of grand jury proceedings via injunctive relief.

Like the trial court, Mr. Morgan's Amended Answering Brief makes no attempt to distinguish this situation from the authorities cited by the County related to grand jury secrecy, and the protections accorded to those materials. Instead, as he did below, Mr. Morgan cites to cases that are plainly distinguishable. The *New York Times v. United States*, 91 St. Ct. 2140 (1971) and *Phoenix Newspapers Inc. v. Superior Court*, (1966) do not evaluate secret grand jury proceedings. Similarly, *State of Maryland v. Baltimore Radio Show*, 70 St. Ct. 252 (1950) was also evaluating certain constitutional standards applicable in open, public court proceedings. These holdings do not provide any guidance on Mr. Morgan's first

amendment defenses with respect to his willful, knowing and repeated publication of secret grand jury proceedings. Rather, they stand for the unremarkable proposition that the press is entitled to attend and report upon public proceedings or report on studies related to the Vietnam War that are allowed into the public domain.

Mr. Morgan does make reference to a new case in his Amended Answering Brief. As with his other authority, however, *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966) (Amended Answering Brief at p. 23) addresses Sixth Amendment considerations related to publication of information obtained during public proceedings—a criminal trial. If anything, this case is not helpful to Mr. Morgan, as it decries an unchecked press that made a mockery of a murder trial, including the impropriety of "numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends." *Sheppard,* 384 U.S. at 353, 86 S. Ct. at 1517. The *Sheppard* court also did not explicitly address First Amendment considerations.

Regardless, the facts of all of Mr. Morgan's cases differ fundamentally from the instant matter, wherein the force of Mr. Morgan's "free press" arguments are limited by the fact that "the First Amendment generally grants the press no right to information about a trial superior to that of the general public." *KPNX Broadcasting v. Superior Court*, 139 Ariz. 246, 255, 678 P.2d 431, 438 (1984). The general

public is not allowed to participate in grand jury proceedings, and neither Mr. Morgan nor the trial court cited case law indicating that Mr. Morgan's first amendment assertions apply in the same manner in the grand jury context.

The trial court and Mr. Morgan also fail to address case law supporting the County's request for injunctive relief in these circumstances. Injunctions requiring the return of grand jury materials issue even where, as is the case here, an individual broadly disseminates the secret materials and then claims that such order is not enforceable due to his own decision to continue placing materials in the public sphere at such a volume as to make full retraction all but impossible. That is because the harm is not only the presence of the materials in the public domain, but more particularly the wrong-doer's continued possession of the materials. In circumstances such as those now before the Court, an injunctive order requiring collection and return of the materials is imperative because it cures the on-going risk of disclosure posed by the individual clearly intent upon perpetuating the misconduct. *See United States v. Under Seal*, 853 F.3d 706, 722-23 (4th Cir. 2017) (Directing return of a junvenile's information that was statutorily protected as confidential despite previous disclosure to third parties, observing that it is the 'continued possession of those materials' by the party disclosing the information addressed by ordering return of the materials, since the real harm is the "ongoing

risk of disclosure.") (citing and quoting *Church of Scientology of Cal v. United States*, 506 U.S. 9, 10-11 (1992)).

The closed nature of the grand jury proceedings is likewise why the relief sought by the County, essentially a clawback order, is the narrowly-tailored, appropriate result, which is still required. The County's proposed order is patterned after published decisions across the nation addressing grand jury disclosures. Where, as is the case here, the Court is asked to prevent violations of the secrecy accorded to the Grand Jury, injunctions of the type sought by the County here have been repeatedly entered. *In re Grand Jury Investigation,* 445 F.3d 266, 270 (3rd Cir. 2006); *Nix*, 21 F.3d at 352 (9th Cir. 1994).

Similarly, the Arizona Court of Appeals has refused to address claims that prior disclosure of grand jury materials waived the protections of the secrecy statute, finding instead the that materials retained their character as confidential materials pursuant to A.R.S. § 13-2812. *Samaritan Health System v. Superior Court*, 182 Ariz. 219, 220, 895 P.2d 131, 132 (App. 1995). Thus, Mr. Morgan's argument (Amended Answering Brief at p. 24) that he is somehow insulated from liability as a result of his deliberate decision to send the Grand Jury materials to "tens of thousands" of people after notice of the illegality of his conduct—an argument that was accepted by the trial court—is squarely rejected by the case law.

CONCLUSION

Mr. Morgan is entitled to his beliefs regarding the County, and he is further entitled to write about his beliefs on his website. Mr. Morgan's stories are not the issue. What is and always has been at issue are Mr. Morgan's repeated, admitted violations of criminal and civil statutes. His violations, coupled with the fact that the content-neutral statutes focus more upon the actual act of publication rather than any speech, as well as his failure to demonstrate any actual chilling effect upon himself or third parties who are not subject of the proceedings, defeat the First Amendment protections that Mr. Morgan seeks to invoke.

By his Answering Brief, Mr. Morgan has failed to rebut the County's showing that trial court: (1) misstated the facts, (2) failed to make findings of fact addressing material elements of the County's claims, (3) interjected new constitutional defenses on Mr. Morgan's behalf during the last day of the evidentiary hearing, and (4) committed a mistake in its application of the law in reaching its conclusion that Cochise County had not established a strong likelihood of success on the merits regarding Mr. Morgan's repeated, and on-going violations of A.R.S. § 13-2812. The trial court further abused its discretion by ignoring the evidence and failing to make factual findings or evaluate the law regarding Mr. Morgan's additional and on-going violations of A.R.S. § 39-121.04 and A.R.S. §

21-312, for which Cochise County had additionally established a strong likelihood of success on the merits.

Because the trial court erred on the facts and the law with respect to the likelihood of success element, and because the record demonstrates that the County is entitled to the relief sought by its Application, the County respectfully requests this Court reverse the trial court's order denying the Application and direct the trial court to enter the form of order proposed by Cochise County on February 15, 2018. Alternatively, the Court should reverse the trial court's order denying the Application and remand the matter with instructions for the trial court to enter full findings of fact and conclusions of law consistent with this Court's opinion on this issue.

RESPECTFULLY SUBMITTED this 22nd day of January, 2019.

COCHISE COUNTY ATTORNEY

By: 

Sara V. Ransom
Civil Deputy County Attorney
Counsel for Appellant

CERTIFICATE OF SERVICE

Original of the foregoing document was e-filed this 22nd day of January, 2019, with the Court of Appeals, Division 2.

Copy of the foregoing document was distributed for service via U.S. Mail and a courtesy copy sent via e-mail to editor@cochisecountyrecord.com & editor.svdr@gmail.com this 22nd day of January, 2019, upon:

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Certificate of Compliance

Undersigned counsel Sara V. Ransom, acting for the State of Arizona, by and through the Cochise County Attorney's Office, hereby certifies, pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, that the Appellant's Reply Brief to which this Certificate is attached uses type of at least 14 points, is double-spaced (excepting headings and footnotes), and contains 6332 words, exclusive of the caption, table of contents, the date and signature block, certificate of service, and this certificate of compliance. The document attached to this Certificate does not exceed the word limits imposed by Rule 14, Arizona Rules of Civil Appellate Procedure.

Dated this 22nd day of January, 2019.

/s/ Sara V. Ransom
Sara V. Ransom, Cochise County Civil Deputy Attorney